SERVED: May 5, 1992

NTSB Order No. EA-3542

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 16th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v. Docket SE-9642

GORDON A. OEMING

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr. on August 23, 1989 at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an order of the Administrator finding respondent in violation of sections 91.79(a) and 91.9 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91.[2] The law judge reduced the suspension of

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[1]That portion of the hearing transcript containing the oral initial decision and order is attached.

[2]Another count, under FAR § 91.31(a), was withdrawn by the Administrator at the hearing.

(continued. . .)

respondent's airline transport pilot certificate imposed by the Administrator from 30 to 20 days.[3]

The complaint arose as a result of respondent's January 11, 1988 piloting of a Bell Helicopter 206B, N2169X, on a passenger-carrying flight in downtown Atlanta, GA. The aircraft carried a photographer, among others, and the purpose of the flight was to take commercial photographs for a local bank. The Administrator alleged that the helicopter hovered at 212 and 277 feet over a congested area and in close proximity to an office building (the Richard Russell federal building). Respondent claimed that his operation was not dangerous; he denied hovering, and disputed the alleged altitude.

The law judge found that operation at the speed ("less than

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[2] (..continued)

Section 91.9 (currently 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

FAR § 91.79(a) (currently 91.l19(a)) provided:

> Minimum safe altitudes: General
>
> Except where necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

[3] The Administrator did not appeal the reduced sanction. We note in this regard that a suspension of greater length would not have been inconsistent with Board precedent. See, e.g., Administrator v. Henderson, NTSB Order EA-3335 (1991) (60-day suspension); and Administrator v. Peelgrane, 5 NTSB 2263 (1987) (90-day suspension).

twenty knots, " Tr. at 268) and height ("less than 300 feet," id.) found was within the so-called "dead man's curve."[4] Elsewhere (Tr. at 271), he found that respondent operated the helicopter in a hover at altitudes of between 212 and 287 feet. He further found that this operation reflected poor judgment on respondent's behalf. Tr. at 270. He concluded that the risk that a safe autorotational landing could not be made was heightened by the lack of sufficient and useable open space in the area. Tr. at 267-268, 270.[5]

We affirm the law judge's decision, with minor modification to his subsidiary findings of fact. Initially, we address a procedural claim respondent raises.

As noted above, there was some confusion with regard to the Administrator's expert witness. One was never identified directly, and the FAA employee who had been named as an intended witness (although not identified as an expert) was replaced at the last minute. While the law judge did not reach this issue,

[4]The Administrator introduced a height/velocity diagram from an applicable flight manual (Exh. A-3). The diagram contained a shaded area within which operations were not recommended. The diagram note provided: "Avoid operation in shaded area." Exhibit A-6 terms the shaded area "unsafe." The law judge's height and velocity findings put the aircraft operation in the non-recommended zone.

[5]In reaching these conclusions, the law judge applied the testimony of the Administrator's expert, Mr. Sasser. Respondent had sought to prevent this testimony, on the grounds that the witness' name had not been provided respondent, and that respondent was not even advised (despite the interrogatory on this question) that the Administrator would call an expert witness. The law judge denied the motion, but gave respondent some time to interview the witness prior to his giving testimony.

we think it fair to conclude from the record that the Administrator's answers to discovery were flawed in that he failed directly to identify an expert witness.[6]

Nevertheless, we do not find this requires ignoring the witness' testimony, as respondent urges. Respondent points to no direct injury suffered as a result of Mr. Sasser's testimony. It is clear that respondent recognized the issues in this case and was fully prepared. His own expert witness testified extensively regarding the height/velocity diagram and its import, as well as other issues addressed by Mr. Sasser. Counsel's thorough cross examination of Mr. Sasser confirms respondent's preparation. Thus, although we admonish the Administrator strictly to comply with discovery requests, we can find no basis to hold that this procedural irregularity denied respondent due process.

Respondent also challenges many of the law judge's significant findings of fact, including the 212-287 foot altitude of the helicopter, that it was hovering, that the operation was within the shaded area of the height/velocity diagram curve, and that the operations would not have allowed for an emergency landing without undue hazard. We reject respondent's challenges, and find the law judge's findings fully supported by the record.

The Administrator has withdrawn the 212 foot allegation (Reply at 9) and we modify the law judge's decision to remove this finding. However, we find no basis to conclude, as

[6]We reject the Administrator's argument that identifying the expert in another answer unrelated to experts was adequate. A direct question was asked and never answered.

respondent seeks, that he was not operating at the height and velocity that would place him within the operating specifications recommended to be avoided as unsafe.

Eyewitness testimony of disinterested observers leaves no doubt that the helicopter was at eye level with the 21st floor of the Russell building. Respondent does not disagree, but argues that the distance to the ground was greater than 287 feet, taking him out of Exh. A-3's shaded area. The record, however, does not support his calculations. Moreover, as the Administrator notes (Reply at 24-26), there were numerous raised areas (e.g., a plaza and an elevated road) that reduced the actual distance between the helicopter and the ground at various locations in the immediate area.

We also see no basis to overturn the law judge's velocity finding. The two disinterested eyewitnesses testified to the helicopter moving very slowly back and forth. Tr. at 34, 47.[7] The law judge relied on this testimony in concluding that the helicopter was operating at less than 20 knots.[8] Credibility determinations, unless arbitrary or capricious, are within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). There is nothing arbitrary or capricious in the judge's conclusion and his choice to rely on

[7]One of the two witnesses described it as "hovering . . . drifting sideways occasionally and not a great deal of movement for several minutes." Id.

[8]The record also contained testimony from witness Sasser regarding the likely speeds, given the helicopter's capabilities, of the movements described by the two eyewitnesses.

testimony other than that of respondent is supported in the record.

The law judge concluded, in view of the flight manual's cautions and specifications, and based on testimony and photos of the area, that there was a high probability, in the event of engine failure, of an unsafe landing. Tr. at 269. Respondent's arguments do not convince us otherwise. Downtown Atlanta during business hours would not appear to be a safe place to perform an emergency landing. Even respondent acknowledges that the area was "congested.'! Appeal at 24. The law judge found that "[an emergency landing] would have been on top of a building, on the mezzanine area in front of the Richard Russell Building, or a parking lot." Tr. at 268. The presence of passengers and the time of the incident create even greater concerns in this case.

Respondent's protestations that he was prepared for an emergency and had identified appropriate landing sites do not convince us that there actually were safe locations available. For example, the parking lots were not empty and there were interferences in a direct flight path to them. Respondent also did not rebut the testimony that rooftops that were not slanted might not be able to support the aircraft. In an emergency landing, the helicopter's altitude would also have left very little time to ensure against damage to the aircraft or its passengers. [9]

[9]We reject the suggestion (Appeal at 25) that, even if he were found to be on the fringes within the shaded area of the (continued. ..)

Finally, respondent challenges the law judge's legal conclusion for finding an "undue hazard" under section 91.79(a) and a potential endangerment under section 91.9. Much of the rationale for finding these violations stems, however, from the subsidiary finding that we have affirmed -- that a safe landing was improbable in the event of an engine failure. Respondent's citations to support a claim that the law judge's decision is inconsistent with Board precedent are unconvincing.

First, we are not persuaded that Administrator v. Hunt, 1 NTSB 534, 537 (1969) is on point, as the transcript contains no testimony by respondent's expert witness regarding whether respondent was careless.[10] In any case, we are not convinced that Hunt is precedent worthy of repetition. Contrary to the approach and result in, Hunt, we do not view the opinions of competing experts as neutralizing a claim by the Administrator. Instead, the quality and probity of the evidence, as well as the witness' credentials, should be the criteria for decision. Thus, respondent's request based on Hunt to dismiss the charges is denied.

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[9] (..continued)
height/velocity diagram, "a pilot with Oeming's capabilities and experience could be expected to overcome this deficiency, if it is even considered a deficiency." There is absolutely no basis for the idea that flight manual guidelines apply to some, not to others. Moreover, respondent's witness Carmichal's statement that the purpose of the height/velocity curve is "just to alert you to be a little more alert" (Tr. at 205) directly conflicts with the wording of the flight manuals.

[10] Although there apparently is an omission in the transcript of this witness' testimony, respondent does not suggest that it was the omitted portion in which this subject was covered.

Second, turning to the merits, neither Reynolds,[11] Kopanke,[12] nor Carman[13] warrants a change in the law judge's decision. Reynolds holds that, to find a section 91.9 violation based on potential harm, the evidence must demonstrate that the likelihood of harm was unacceptably high or that the pilot's exercise of judgment was clearly deficient. Both findings can be made here. The Administrator offered sufficient evidence to prove: that the operation was within the area of the height/velocity curve that is to be avoided and creates a serious risk of accident in the event of engine failure; and that the location and time of day created substantial additional hazards to a safe emergency landing. Furthermore, as the Administrator notes, the law judge made findings, which respondent offers no good reason to overturn, to the effect that the pilot's judgment was deficient.

Respondent's discussion of the Kopanke precedent is misleading. Not only are the facts there considerably different, but respondent's references are to the law judge's, not the Board's decision. As the Administrator points out, in applying the phrase "undue hazard" in section 91.79(a), the Board there relied on its analysis in Administrator v. Michelson, 3 NTSB 3110 (1980), which specifically overturned the reasoning used by

[11] Administrator v. Reynolds, 4 NTSB 240, 242 (1982).

[12] Administrator v. Kopanke, 3 NTSB 3135 (1980).

[13] Administrator v. Carman, 5 NTSB 1271 (1986) and Carman v. McArtor, NTSB Order EA-2679 (1988).

the law judge in Kopanke. Michelson supports rather than undermines the Administrator's position:

> Whatever else "undue hazard" may mean, we are satisfied that it embraces a situation in which a pilot's cruising altitude would not likely permit the aircraft to land without striking or passing dangerously close to, people or property on the surface . . . . To prove a violation of section 91.79(a), the Administrator did not have to show that it would have been impossible for respondent to have made a emergency landing without injury or damage . . . in the event his engine had failed . . . . The Administrator had to show only that an emergency landing from the altitude respondent passed through presented an unreasonable risk of such harm.

Id. at 3113-3114. The Administrator offered, and the law judge accepted, that proof here.

Carman, finally, is equally unhelpful to respondent. That there is no minimum altitude for helicopter operations does not prove that section 91.79(a) is void for vagueness. The rule is clear, and the type of evidence" offered here, including reliance on the height/velocity curve, is more than adequate to meet the Administrator's burden of proof. Accord Administrator v. LoFranco, NTSB Order EA-2748 (1988). The record fully supports the law judge's finding that respondent violated 49 C.F.R. 91.79(a) and 91.9.

ACCORDINGLY , IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is modified as set forth in this opinion;

3. The order of suspension, as modified by the law judge and herein, is affirmed; and

4. The 20-day suspension of respondent Oeming's airline transport pilot certificate shall begin 30 days from the date of service of this order.[14]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[14] For the purposes of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR section 61.19(f).